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September 4, 2003

VIA HAND DELIVERY

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW – Room 700
Washington, DC 20423-0001

-208839

Re: Finance Docket No. 34192 (Sub-No. 1)
Hi Tech Trans LLC – Petition for Declaratory Order

Dear Secretary Williams:

In connection with the above-referenced matter, we have enclosed for filing an original and 10 copies of the State of New Jersey Department of Environmental Protection's Reply to Appeal of Hi Tech Trans, LLC Pursuant to 49 C.F.R. § 1011.2(a)(7), as well as the requisite 3.5" disk containing the Reply. We have also enclosed a copy of the Reply for date stamping and return to us via our messenger.

Thank you for your assistance with this filing. Should you have any questions, please do not hesitate to contact the undersigned at the direct dial number noted above.

Very truly yours,

David K. Monroe

Enclosures

cc: All Counsel of Record

INTERLAW.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34192 (Sub-No. 1)

HI TECH TRANS, LLC
– PETITION FOR DECLARATORY ORDER –
RAIL TRANSLOAD FACILITY AT OAK ISLAND YARD, NEWARK, NJ

Office of Proceedings
SEP 2003
Part of
Public Record

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION'S
REPLY TO APPEAL OF HI TECH TRANS, LLC PURSUANT TO 49 C.F.R. § 1011.2(a)(7)

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Special Counsel for the
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ENVIRONMENTAL PROTECTION

DATE: September 4, 2003

The State of New Jersey, Department of Environmental Protection ("NJDEP") hereby submits this reply to the appeal of Hi Tech Trans, LLC filed on or about August 25, 2003, by Hi Tech Trans, LLC ("Hi Tech"). As set forth more fully below, NJDEP respectfully submits that the Board should deny Hi Tech's appeal and affirm the Decision of the Director of the Office of Proceedings, served August 14, 2003 (hereinafter, the "Decision" or "Director's Decision").

I. INTRODUCTION

This appeal is but one of numerous proceedings arising in connection with Hi Tech's determined effort to avoid state regulation of its activities, including its operation of a solid waste facility at the Oak Island Rail Yard in Newark, New Jersey. Hi Tech does not claim that New Jersey's environmental regulations are unreasonable, discriminatory or unfair. Nor does Hi Tech allege that it is somehow incapable of complying with New Jersey law. Rather, Hi Tech simply does not *want* to comply with the state environmental regulations applicable to all other solid waste facilities operating in New Jersey. Indeed, Hi Tech was apparently established with the specific intent of circumventing the environmental statutes and regulations applicable to other solid waste facilities, including associated solid waste flow control regulations. Hi Tech apparently believes that it had found a foolproof way to completely insulate itself from state regulation of its solid waste disposal business by attempting to structure its business arrangements and operations in such a way as to bring itself within the preemption provisions of 49 U.S.C. § 10501(b) – a federal preemption statute applicable only to rail carriers.

Hi Tech has been able to operate for almost two years now, free from the environmental and solid waste flow regulations applicable to its competitors, by asserting in a variety of judicial and administrative proceedings, including this one, that it provides "transportation by rail carrier" within

the exclusive jurisdiction of the Surface Transportation Board ("STB"). In its Decision served August 14, 2003, the Director of the Office of Proceedings determined that the Board does *not* have exclusive jurisdiction over Hi Tech's operation of the solid waste facility at the Oak Island Rail Yard, and that Hi Tech's activities are *not* preempted by 49 U.S.C. §10501(b). *Hi Tech II* at 7. Hi Tech has appealed the Decision to the Board.

Hi Tech attacks the Decision in strongly-worded language, claiming that the Decision "adopts a new, substantive and restrictive view of the Board's jurisdiction in federal preemption," and "is contrary to the relevant statutory provisions, all prior precedent on the subject, and the transportation and deregulatory policy underlying ICCTA." But even a cursory review of the Decision demonstrates that Hi Tech's overheated rhetoric lacks substance. The Decision does not adopt a "new" test for determining the scope of the Board's jurisdiction; it is fully consistent with the plain language of the statute and prior Board precedent. Moreover, although the crux of Hi Tech's position appears to be its contention that the Decision failed to consider whether Hi Tech's activities were "integrally related" to rail transportation, the Decision explicitly undertook that analysis and found Hi Tech's operations could not meet the "integrally related to rail transportation" standard. The Decision's conclusion in that respect is wholly consistent with the one judicial decision to have addressed the precise issue raised in this proceeding – a decision upon which Hi Tech itself principally relies.

As set forth more fully below, there is nothing new or earthshattering about the Director's Decision rejecting Hi Tech's claim that it is immune from state environmental regulation pursuant to the preemption provisions of Section 10501(b). The Director's Decision should be affirmed.

II. BACKGROUND

As referenced in the Decision itself, this matter has a long history at the Board, including numerous requests by Hi Tech for informal decisions, Hi Tech's initial petition for a declaratory order proceeding addressed in *Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, NJ*, Finance Docket No. 34192 (STB served November 20, 2002) ("*Hi Tech I*"), a petition for clarification, and Hi Tech's most recent petition for a declaratory order proceeding addressed in *Hi Tech II*. Hi Tech has also commenced numerous proceedings in federal district and circuit court relating to this matter, and there is also a state administrative proceeding pending before the Commissioner of Environmental Protection in New Jersey. These various proceedings and other background information relating to this matter are set forth fully in the briefs filed with the Office of Proceedings. In the interest of brevity, NJDEP respectfully refers the Board to those pleadings.

III. THE APPROPRIATE STANDARD OF REVIEW

Hi Tech contends that the appropriate standard of review in this case is *de novo* pursuant to 49 C.F.R. § 1115.2(b), rather than the "clear error and manifest in justice" standard set forth in Section 1115.1(c). Hi Tech's position is, however, contrary to the express provisions of the Board's regulations which provide that a denial of a request to institute a declaratory order proceeding will be granted only to "correct a clear error of judgment or to prevent manifest injustice." *See* 49 C.F.R. § 1115.1(c). The applicability of Section 1115.1(c) to appeals such as this one was recently confirmed by the Board in *Charles M. Sotelo – Petition for Declaratory Order – Line Relocation in Cochise County, AZ*, Finance Docket No. 34191 (STB served August 11, 2003). Accordingly, Hi Tech's suggestion that a *de novo* standard of review should apply would appear to be incorrect.

NJDEP believes, however, that the particular standard of review applied in this appeal will not materially alter the result. The Director's Decision at issue in this case is fully consistent with the applicable statutory language as well as prior board precedent and should be upheld under either a "clear error/manifest injustice" standard or a *de novo* standard.

IV. THE DECISION CORRECTLY APPLIED THE PLAIN LANGUAGE OF ICCTA AND THE BOARD'S PRIOR DECISIONS IN DETERMINING THAT HI TECH'S ACTIVITIES ARE NOT WITHIN THE BOARD'S EXCLUSIVE JURISDICTION AND THAT STATE ENVIRONMENTAL REGULATION OF HI TECH'S OPERATIONS IS NOT PREEMPTED

A. The Decision Is Consistent With The Plain Language Of ICCTA And Prior Precedent.

The Director's Decision held that in order to come within the preemption provisions of Section 10501, Hi Tech must show that its activities are within the Board's exclusive jurisdiction over "transportation by rail carrier." Decision at 5. Applying the plain language of Section 10501, the Decision noted that Hi Tech must demonstrate that its activities are "both (1) transportation, and (2) performed by, or under the auspices of, a rail carrier." *Id.* While noting that at least some of Hi Tech's operations come within the broad definition of "transportation," the Decision ultimately determined that Hi Tech's activities cannot meet the "by rail carrier" portion of the test required to come within the Board's exclusive jurisdiction. In particular, the Decision concluded that since Hi Tech is not itself a "rail carrier," any transportation it provides cannot directly meet the "by rail carrier" requirement. In addition, the Decision closely examined Hi Tech's relationship to the Canadian Pacific and concluded that "CP's level of involvement with Hi Tech's transloading operation at its Oak Island Yard is minimal and insufficient to make Hi Tech's activities an integral part of CP's provision of transportation by rail carrier." *Id.* at 7.

Hi Tech claims that there is no support for the requirement that its activities be performed by, or under the auspices of, a rail carrier, in order to come within the Board's exclusive jurisdiction. Noting the broad statutory definitions of "transportation" and "railroad," Hi Tech argues that the proper analysis for determining the Board's exclusive jurisdiction should be whether Hi Tech's transportation activities are sufficiently related to rail transportation generally. The plain language of the statute, however, defines the Board's jurisdiction to be over "transportation by rail carrier," not "activities related to rail transportation generally." The Director's Decision gives effect to the statutory requirement that transportation activities be "by rail carrier" to come within the Board's jurisdiction; Hi Tech's analysis conveniently ignores that portion of the statutory test. Accordingly, the Director's Decision is consistent with the plain language of the statute while Hi Tech's position is not.

The Decision had it exactly correct when it stated, at 6, that "[b]y Hi Tech's reasoning, any third party or non-carrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier." Hi Tech's argument means that the construction of storage or loading facilities, as well as the yard tracks to which these facilities are adjacent, by an industry on industry property would fall within the exclusive jurisdiction of the Board and would thereby be preempted from any federal, state or local oversight as long as the goods moved into or out of the plant by rail. By such reasoning, all rail-served chemical and petroleum shippers, for example, would avoid state and local oversight concerning environmental and zoning issues. Rail served nuclear fuel processing plants would likewise avoid federal, as well as state, oversight relating to critical issues such as site selection. That Hi Tech has offered no support for such an ambitious expansion of the preemption provision in the ICCTA is telling.

Similarly, Hi Tech has offered no support for its contention that the preemption somehow covers "all shipper activities at team tracks". (Appeal at 15.) We are aware of no case holding that § 10501(b) somehow gives the Board exclusive jurisdiction over the activities *of a shipper* at team tracks or otherwise. Yet that reading may be permissible if § 10501(b)(2) is read in a vacuum without any reference to the rest of that section. By omitting the "rail carrier" component of this subsection, any construction, acquisition, operation, etc. of spur, industrial, switching or side tracks – even if done exclusively by a shipper for the shipper's own private use – would then fall within the scope of the Board's exclusive jurisdiction. But no case has ever come to this conclusion and there is no indication that Congress intended any such result. To the contrary, § 10501(b)(2) is necessarily restricted to the activities of rail carriers, which of course is consistent with the remainder of the jurisdictional provisions of § 10501.

Moreover, Hi Tech's suggestion that the Decision's articulation of the "by rail carrier" requirement is unprecedented is simply wrong. The Board *has* previously commented on whether facilities or operations of a non-rail carrier come within the preemptive scope of Section 10501(b). In *Borough of Riverdale – Petition for Declaratory Order – The New York, Susquehanna & Western Railway Corporation*, Finance Docket No. 33466 (STB served September 10, 1999) ("*Riverdale I*"), the Board made clear that facilities or operations of a rail carrier are preempted only if they are integrally related to the provision of interstate rail transportation. In discussing an alleged non-transportation facility operated by a rail carrier (a corn processing plant), the Board also made clear that facilities of a non-carrier are not within the preemptive scope of Section 10501(b):

> If this facility is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, *like any non-railroad property*, it would be subject to applicable state and local regulation.

Riverdale I at 10 (emphasis added). In other words, facilities or operations fall within the scope of the preemption only if they are operated or performed by a railroad and are integrally related to the provision of rail transportation services. The Decision is obviously consistent with the Board's indication in *Riverdale I*, that facilities of non-carriers are simply not within the preemptive scope of Section10501(b).[1]

B. Neither The Board Nor The Courts Have Ever Found The Activities Of A Non-Carrier Shipper Like Hi Tech To Be Within The Scope Of Preemption Under 10501(b).

While Hi Tech asserts that the Director's Decision is inconsistent with what it calls "specific precedent" applying preemption under ICCTA, the simple truth of the matter is that neither the Board nor any court has ever found the activities of a non-carrier shipper like Hi Tech to be within the scope of preemption under Section10501(b). While the vast majority of Board and court cases addressing preemption under Section 10501(b) have involved facilities and operations of established rail carriers, there is one judicial decision addressing a claim of preemption by a non-carrier. In *Florida East Coast Railway Co. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001) ("*FEC*"), the court rejected a claim of preemption under Section 10501(b) involving a non-carrier operating on railroad property in circumstances remarkably similar to the facts of this case. Indeed, the factual situation in *FEC* was the mirror image of the circumstances in *Hi Tech II*.

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[1] Hi Tech's assertion that the Decision rejected the "integrally related" principle applied in *Riverdale I* is inaccurate. The Decision analyzed Hi Tech's operations and their relationship to Canadian Pacific, and concluded that Hi Tech's activities are not integrally related to Canadian Pacific's rail operations. For that reason, Hi Tech's request for further evidentiary proceedings (Appeal at 21-22) should be denied. Hi Tech has had every opportunity to present evidence demonstrating that its operations are "integrally related" to rail transportation. Further proceedings would accomplish nothing but further delay in holding Hi Tech accountable for its willful noncompliance with state environmental regulations.

In *FEC*, the non-carrier seeking preemption was engaged in the unloading and final delivery of its own freight on the property of its rail carrier. In this case, Hi Tech is undertaking the collection and loading of its own freight on the property of its rail carrier. In both cases, the operations by the non-carriers were undertaken on their own behalf and are the sort of services generally provided by rail shippers with respect to their own freight. Although these services are necessary steps in the logistics of shipping freight by rail, and are therefore beneficial to rail transportation generally, they do not thereby become "transportation by rail carrier," nor "integrally related to the provision of rail transportation."

In *FEC*, the Court found that the non-carrier's activities were not within the scope of Section 10501(b) because they were not integrally related to the provision of rail transportation. The Director's decision made the same finding with respect to Hi Tech's activities. Hi Tech's reliance on *FEC* is, accordingly, misplaced.[2]

Hi Tech also cites *Fletcher Granite Company, LLC – Petition for Declaratory Order*, Finance Docket No. 34020 (STB served June 29, 2001) ("*Fletcher Granite*"), in support of its position. But *Fletcher Granite* never addressed the substantive issue of whether the activities of a non-carrier are subject to preemption under Section 10501(b). In *Fletcher Granite*, the Board declined to institute a declaratory order proceeding due to the lack of a live controversy. Although the Board referenced Board and judicial precedent regarding preemption to provide guidance to the

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[2] Hi Tech appears to place great stock in *dicta* contained in a footnote in *FEC* which suggests that it might be possible that a third-party might be so intertwined with the provision of rail transportation services that its activities might be subject to preemption. *See FEC*, 266 F.3d at 1337, n.9. However, the *dictum* upon which Hi Tech appears to pin its hopes is not inconsistent with the Director's Decision, and cannot change the fact that the *holding* of *FEC* – based on facts extremely similar to those at issue here – supports the Decision's conclusion that Hi Tech's activities are not preempted.

parties, there is nothing in that discussion that is in any way inconsistent with the Director's Decision. Accordingly, *Fletcher Granite* does not support Hi Tech's position.[3]

C. Hi Tech's Reliance On The Initial Decision Of A State Administrative Law Judge Is Misplaced.

Hi Tech relies heavily on the initial decision of ALJ Masin in the state administrative proceeding involving Hi Tech's facility. However, ALJ Masin's initial decision is of extremely questionable authority.[4] As a preliminary matter, ALJ Masin's initial decision has no force or effect, even under New Jersey law, unless or until it is accepted or affirmed by the Commissioner of Environmental Protection, who is the final decisionmaker under New Jersey law.[5] Moreover, the analysis of a state ALJ with little familiarity with transportation law or industry practices and

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[3] Hi Tech also suggests that the Decision is somehow inconsistent with the Board's holding in *Hi Tech I*. Hi Tech argues that *dicta* in *Hi Tech I* seemed to suggest that Hi Tech's transloading operations might be considered integral to the rail transportation provided by Canadian Pacific. Hi Tech suggests that the *Hi Tech I dicta* demonstrates that the requirement that "transportation" be provided "by a rail carrier" articulated in the Decision establishes a new policy.

But Hi Tech ignores the fact that *Hi Tech I* did not specifically address the issue reached in *Hi Tech II* – whether Hi Tech's operations could be considered to be under the auspices of Canadian Pacific. While Hi Tech implies that the Board should have been aware of all of the facts addressed by the Decision by the time of *Hi Tech I*, the simple fact of the matter is that the Board did not need to address all of the underlying facts relating to Hi Tech's relationship to Canadian Pacific to reach this conclusion in *Hi Tech I*. When the Board did consider the facts relevant to Hi Tech's relationship to Canadian Pacific, it determined that Hi Tech's operations were not integrally related to Canadian Pacific's provision of rail transportation.

[4] Indeed, in its letter in this proceeding of July 31, 2003, urging expedited consideration of its new Petition for Declaratory Order, Hi Tech argued that "[t]he issue of the Board's jurisdiction (and specifically, whether the Board has jurisdiction over Hi Tech's transloading facility) should be decided by the Board, not by a state administrative law judge." That proposition is no less correct now that the Decision conflicts with Judge Masin's initial decision.

[5] The Commissioner is considering ALJ Masin's initial decision as well as formal exceptions to that decision filed by NJDEP and other parties, but has not yet ruled on the matter.

conventions is necessarily suspect. This is particularly so, given the fact that Judge Masin relied principally on the decision in *FEC*, but reached the exact opposite conclusion reached by the *FEC* Court.

Even a cursory review of Judge Masin's initial decision demonstrates that he failed to recognize that Hi Tech's activities in loading its own freight into rail cars is no different than the activities of most shippers. ALJ Masin's conclusion that any activities or operations which in some way benefit a rail carrier or rail transportation is preempted under Section 10501(b) would sweep within the scope of that provision virtually all industrial shippers and freight forwarders who load their own freight into railcars. There is simply no support for such an expansive reading of the Board's exclusive jurisdiction in the language of ICCTA, Board precedent, judicial case law construing Section 10501(b), or even the *FEC* case itself.

D. The Decision Is Consistent With Congressional Policies Designed To Protect Railroads, And Not Non-Carriers Seeking To Avoid State Regulation.

Hi Tech contends that the purportedly "new" preemption policy set forth in the Decision could have industry-wide consequences, including the potential disruption of contractual relationships between rail carriers and third-parties. As a preliminary matter, Hi Tech proceeds from a false premise. The Decision breaks no new ground and establishes no new policies regarding the preemptive effect of Section 10501(b). As set forth more fully above, the Decision is fully consistent with the plain language of ICCTA and the Board's prior decisions regarding preemption.

Perhaps more to the point, Hi Tech's implicit assumption that the rail transportation industry assumes that preemption covers not only rail carriers, but also non-carriers with whom they have contractual relations, is wholly without support. Indeed, the dearth of judicial and Board proceedings

involving claims of preemption by non-carriers is strong evidence to the contrary. Shippers, freight forwarders and other non-carrier participants in the transportation industry do not currently assume that their activities fall within the exclusive jurisdiction of the Board, nor do they assume that state and local regulations are preempted by Section 10501(b). Accordingly, the predictions of "industry-wide" consequences arising from the Decision lacks any foundation in fact.

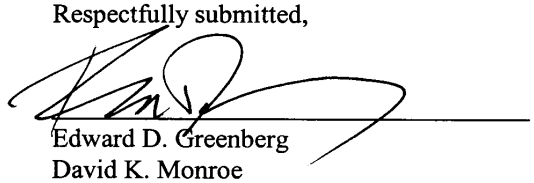
Hi Tech also appears to argue that the result of the Decision's restriction of preemption to "transportation by rail carrier" would be to somehow undermine the policies underlying ICCTA. Hi Tech describes itself as "one of a growing breed of third-party intermediaries" whose development is important to rail transportation. Hi Tech suggests, but does not explain how, the growth of such intermediaries will be stunted unless they are able to avail themselves of the preemption provisions of Section 10501(b).

Congress has long been aware, however, that the activities of rail intermediaries and shippers are important to the rail transportation system. Nonetheless, Congress has not extended the Board's exclusive jurisdiction over those entities and activities, and there is no legal basis or congressional policy which would support the broad expansion of the Board's exclusive jurisdiction suggested by Hi Tech. Hi Tech's ardent desire to avoid complying with the state and local regulations applicable to its competitors is not a basis for expanding the scope of Section 10501(b).

V. CONCLUSION

For all of the foregoing reasons, the Director's Decision should be affirmed.

Respectfully submitted,



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DATE: September 4, 2003

CERTIFICATE OF SERVICE

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